84-1175

Office-Supreme Court, U.S
FILED
JAN 28 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

David Nelson,

Petitioner

v.

The State of Texas

Supplemental Appendix to Petition for a Writ of Certiorari to the Court of Criminal Appeals Austin, Texas

R. L. Whitehead, Jr.
Whitehead-Beckworth
505 North Green Street
Longview, Texas 75601
(214) 758-0561

Attorney for Petitioner

THE STATE OF TEXAS
v.
DAVID ANTHONY NELSON,
Defendant

No. 12,641-B

In the 188th Judicial District Court
Gregg County, Texas

September 23, 1981

JUDGMENT

The defendant having been indicted in the above entitled and numbered cause for the felony offense of Murder, and this day this cause being called for trial, the State appeared by her assistant Criminal District Attorney Rob Foster, and the Defendant appeared in person and his counsel R. L. Whitehead, Jr. also being present, and both parties announced ready for trial, the said Defendant in open Court was duly arraigned and pleaded Not Guilty to the charge contained in the indictment herein; thereupon a jury,

to-wit: George A. Pounds and eleven others, was duly selected, impaneled and sworn, who having heard the indictment read, and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the Defendant, and after hearing arguments of counsel, retired in charge of the proper officer to consider of their verdict, and afterward were brought into open Court, by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open Court in the following verdict, which was received by the Court, and is here now entered upon the minutes of the Court, to-wit:

"We, the Jury, find the defendant guilty of Voluntary Manslaughter.

George A. Pounds
Foreman

The Defendant heretofore, at the time of entering his plea herein, having requested in writing that the jury assess the punishment herein and after further evidence being heard by the jury, the Court again charged the jury as provided by law, and the jury after hearing arguments of counsel, retired in charge of the proper officer to consider of their verdict and afterwards was brought into open court by the proper officer, the Defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received by the Court and is here and now entered upon the minutes of the Court to-wit:

"We the Jury, Having found the defendant guilty as charged, assess his punishment at Five (5) years Confinement in the Texas Department of Corrections.

George A. Pounds
Foreman

It is therefore considered and adjudged by the Court, that the said Defendant is guilty of the felony offense of Voluntary Manslaughter and that the said Defendant committed said offense on the 1st day of November, 1980, as found by the jury, and that he be punished, as has been determined by the jury, by confinement in the Texas Department of Corrections for Five (5) Years, and that the State of Texas do have and recover of the said Defendant all costs in the prosecution expended, for which execution will issue; and that said Defendant is remanded to the Sheriff of Gregg County, to await the further order of the Court herein.

Marcus Vascocu
Judge Presiding

THE STATE OF TEXAS
v.
DAVID ANTHONY NELSON,
Defendant

No. 12,641-B

In the 188th Judicial District Court
Gregg County, Texas

October 5, 1981

SENTENCE

THIS DAY this cause being again called, the State appeared by her Criminal District Attorney, and the Defendant, David Anthony Nelson, appeared in open Court in person, for the purpose of having sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him at a former time; and thereupon the said Defendant, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and it

appearing to the Court that the Defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of the said Defendant, his counsel R. L. Whitehead, Jr. also being present, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT, That the said Defendant, who has been adjudged to be guilty of Voluntary Manslaughter and whose punishment has been assessed by the verdict of the jury at confinement in the Texas Department of Corrections, for Five (5) Years be delivered by the Sheriff of Gregg County, Texas, immediately, to the Director of the Texas Department of Corrections, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said Texas Department of Corrections for Five (5) Years in accordance with the provisions of the law governing the Texas

Department of Corrections of said State and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

It is further ADJUDGED and DECREED by this Court that the sentence pronounced herein shall begin this date, and that the Defendant is _____.

Marcus Vascocu
Judge Presiding

DAVID ANTHONY NELSON,
Appellant
v.
THE STATE OF TEXAS,
Appellee

No. 12-81-0219-CR

In the Court of Appeals
Twelfth Supreme Judicial District
Tyler, Texas

February 29, 1984

Nelson was indicted for the offense of murder and was first tried on that indictment during the week of April 27, 1981. A jury found him guilty of the lesser included offense of voluntary manslaughter in the first trial and assessed his punishment at eleven years' confinement. Sentence was pronounced in May 1981. On June 19, 1981, the trial court granted Nelson's amended motion for new trial. In the second trial the trial court submitted to the jury the offenses of voluntary manslaughter, involuntary

BES

manslaughter and criminally negligent homicide. The jury convicted Nelson of voluntary manslaughter and assessed his punishment at five years confinement. He urges six grounds of error claiming the trial court erred: (1) in failing to instruct the jury regarding exculpatory statements contained in his written statement which was introduced by the State; (3) in failing to charge on the law of circumstantial evidence; (4) in failing to grant his motion for change of venue; (5) in permitting the State to introduce only portions of his written statement; and (6) in receiving certain photographs into evidence. Nelson also contends by his second ground of error that the State failed to disprove certain exculpatory statements contained in his written confession beyond a reasonable doubt. We affirm.

T AVAILABLE COPY

The evidence shows that on the 31st day of October, 1980 (Halloween night), the deceased, Kevin Yarborough, and ten other youths were riding in a pickup truck owned and driven by Jeff Adams. Two of the youths were riding in the cab with Adams and the remaining eight were riding in the bed of the pickup. Yarborough was seated on the left rear wheel well inside the bed of the truck. The other seven youths were in various locations inside the truck bed. Collectively, the boys had acquired ten dozen cans of raw biscuit dough and some balloons which were filled with water, and were riding about throwing the dough and water balloons at passing vehicles. Shortly before the shot was fired by Nelson causing the death of Yarborough, according to the testimony of Adams and two of the passengers, Reese Walhof and Craig Hogan (State's witnesses), several biscuits had been thrown

at and struck a "little red truck" as it approached from the opposite direction. Adams, Walhof and Hogan all testified that they heard the "thud" as the biscuits struck the red truck. Each of these witnesses also testified that the little red truck made a "U" turn behind them and began following their vehicle. The record reflects that a short time later when Adams' truck, traveling in an easterly direction on Helene Street approached the intersection of Cook Lane and Helene in Longview, the red truck was stopped at a stop sign on Cook Lane at the intersection. Adams, Walhof and Hogan all testified that Adams turned his truck to the right (south) on Cook Lane and was proceeding down the street when the shot was fired. Adams testified that he looked in his rear view mirror, saw the "...flare come oft the pistol..." from the "driver's side." Walhof testified that shortly

after the biscuits were thrown striking the red truck, he saw the truck turn around and follow Adams' vehicle. Walhof's testimony was virtually identical with Adams' testimony respecting the sequence of events at the time of and just prior to the shooting. Walhof also testified that he saw the "gun" come out of the driver's window and fire at a time when the Adams' vehicle was approximately sixty yards distance from the red truck. The evidence shows that the Adams' truck turned right on Cook Lane and was headed south which was the same direction the Nelson truck was facing at the intersection where the stop sign was located.

Shortly after the shooting, some of the boys riding in the bed of the pickup truck noticed that Yarborough was lying down and motionless. Subsequently Yarborough was taken by ambulance to the emergency room of Good Shephered Hospital in Longview where he died from his wounds.

During the course of the investigation of the homicide, certain officers by pure coincidence observed a small red pickup truck matching the description of the "little red truck" given by some of the boys who were passengers in Adams' truck on October 31, 1980. Detective Lieutenant Travis Puckett, District Attorney Odis R. Hill and his criminal investigator, Frank Odom, recorded the license number (RL 7254) of the truck. A check of the truck's registration revealed the owner to be David Nelson of Gilmer. Meanwhile, Puckett who examined the body of the victim at the hospital, found and recovered a spent bullet from between the clothing and body. This bullet was introduced into evidence at trial and was identified by expert testimony as a "nine millimeter bullet." Thereafter, Puckett and other officers interviewed Nelson at his home near Gilmer on November 18, 1980.

Nelson denied any knowledge of the shooting and told the officers that he went to a party on Halloween night and left the party at about 2:00 a.m. on November 1, 1980. The evidence does not establish the precise time of the shooting, but shows that it occurred sometime before 12:25 a.m. on November 1, 1980. Nelson during the interview, however, did admit that he owned a 9 millimeter pistol, and at the request of the investigating officers, gave them the pistol and some live cartridges. The pistol was introduced into evidence at trial by the State. Ballistic test results obtained by the officers were inconclusive to establish that the fatal shot was fired from Nelson's handgun. The red truck owned by Nelson was described by Puckett at trial as a "small type red pickup equipped with a pipe-type rack" and a "headache" rack with bars extends up above the cab.

On November 20, 1980, Nelson was arrested and charged with the murder of Yarborough. Following his arrest, and on the same day Nelson gave a written statement[1] to Odom. Although the State contends that it did not introduce certain portions of the statement, the record demonstrates that the State did offer, and that the trial court admitted on the State's offer the entire statement. (R. II-514 1-2, 3)

As earlier noted, Nelson contends that the trial court erred in refusing to instruct the jury that since the State introduced Nelson's statement, the State was bound by any exculpatory statements contained therein unless the same were disproved by the State by other evidence beyond a reasonable doubt.

Nelson contends the phrase, "there was a bunch of them in the truck, so I figured I would shoot out the tire.", was

exculpatory as to voluntary manslaughter, the offense of which he was convicted. It is a well-settled rule of law in this state that where a defendant makes an oral or written admission of guilt which is introduced into evidence by the State and which admission contains exculpatory matters, the State is bound by the exculpatory declarations contained therein, unless it disproves them beyond a reasonable doubt; moreover, the trial court in such instances is duty bound to clearly and positively so charge the jury. Wooley v. State, 162 Tex. Crim. 378, 285 S.W.2d 219 (1955); Robidoux v. State, 116 Tex. Crim. 432, 34 S.W.2d 863 (1931). However, before the so-called general rule requiring instruction on exculpatory statements made by defendant becomes applicable, the statement of the defendant must amount to an admission or confession of guilt. Nelson's statement contains no

admission of his guilt. Nowhere in the statement is found any admission by Nelson that he shot any person. Under these facts, the rule may not be invoked. Palafox v. State, 608 S.W.2d 177 (Tex. Cr. App. 1980), and cases therein cited at page 181. Ground 1 is overruled. Because of our ruling on Ground No. 1, Nelson's second ground of error contending that the State failed to disprove Nelson's "exculpatory statements beyond a reasonable doubt" is also overruled.

Ground of Error 3 under which Nelson complains of the trial court's failure to charge the jury on the law of circumstantial evidence has no merit. The charge was not required and in fact it would have been improper. Hankins v. State, 646 S.W.2d 191, 197-199 (Tex. Cr. App. on Rehearing 1983).

On July 16, 1981, Nelson filed and urged a motion for change of venue alleg-

ing the existence of "...so great a prejudice against him that he cannot obtain a fair and impartial trial in Gregg County." The motion was duly controverted by the State, and hence the issues so joined were triable by the trial court. Art. 31.04, Tex. Crim. Proc. Code Ann.; McManus v. State, 591 S.W.2d 505 (Tex. Cr. App. 1979). The trial court overruled his motion and Nelson complains of such ruling under his fourth ground of error. In support of this ground Nelson in his brief refers to certain evidence presented at a pretrial hearing on his motion for change of venue conducted on the 5th day of August, 1981. Particularly, Nelson refers to the testimony of witnesses and exhibits of news stories. The record of that hearing is not a part of this record on appeal. Although Nelson requested that the trial court take judicial notice of that proceeding, the record reveals that

the trial court overruled his motion for change of venue without ruling on Nelson's request. Under such circumstances, of course, we will disregard the references in Nelson's brief relating to the evidence adduced at the hearing conducted by the trial court on August 5, 1981.

The record does reflect that at the time of the trial Gregg County had a population in excess of 100,000 and approximately 48,000 qualified jurors. Sixty-two jurors made up the panel from which the jury was selected in this case; and only eleven of those were excused by the trial court on challenges for cause. The individual voir dire examinations of the prospective jurors demonstrates that virtually all the jurors had read or heard about the case from newspaper articles, radio broadcast or telecasts, and a few had otherwise heard the case discussed. Almost all of the jurors were aware of the

first trial, Nelson's conviction and the fact that Nelson did receive a new trial.

Nelson argues that because the facts elicited from the prospective jurors show that at least fifty-nine of them were aware of the murder and the prior trial, that he could not receive a fair and impartial trial. He correctly states that he was denied five additional peremptory challenges but does not indentify any juror who served on the jury that convicted him who was objectionable to him. Nelson does not complain in this appeal of the court's action in overruling a challenge for cause made by him of any prospective juror. Indeed the record does not reveal that he objected to any such action if it occurred.

Our analysis of the evidence presented to the trial court during the voir dire examination of the individual jurors indirectly indicates that the case

was the subject of fairly wide spread publicity. There is no evidence, however, that any of the news media stories were inflammatory or inaccurate. The mere fact that most of the prospective jurors had previously been informed of the murder of Kevin Yarborough and of the fact that Nelson was accused of the homicide and had been tried and convicted and granted a new trial, standing alone is insufficient to mandate the granting on Nelson's motion for change of venue. Adami v. State, 524 S.W.2d 693 (Tex. Cr. App. 1975); Eckert v. State, 623 S.W.2d 359, 363-64 (Tex. Cr. App. 1981). We hold that the trial court did not abuse its discretion in overruling Nelson's motion. Demouchette v. State, 591 S.W.2d 488, 490 (Tex. Cr. App. 1979). His fourth ground is overruled.

Nelson's fifth ground of error complains of the trial court's action in permitting the State to introduce "por-

tions" of his statement. As already noted, the State introduced the entire statement but read only portions of the statement to the jury. Thus Nelson's contentions are unsupported by the facts. In any event no error is shown. Art. 38.24, Tex. Crim. Proc. Code Ann.; Harrington v. State, 547 S.W.2d 616, 621 (Tex. Cr. App. 1977). Nelson's fifth ground is overruled.

Finally, Nelson contends that the trial court erred in admitting into evidence certain photographs introduced by the State. (State's Exhibit Nos. 15-20) These exhibits were photographs of the truck in which the victim was riding on the night of the shooting, and were taken by the State during a reconstruction of the crime scene during daylight hours. The jury was informed that the photographs were taken in daylight as opposed to night time at the time the pictures were of-

fered. We hold that this discrepancy affects only the weight and not the admissibility of the exhibits. And we further conclude that the jury was not misled. Ground six is overruled. The judgment of the trial court is affirmed.

(This opinion is not to be published. Rule 207(a), Rules of Post Trial and Appellate Procedure in Criminal Cases.)

FOOTNOTE

1. Omitting the formal parts the statement reads as follows:
Left home, went over to Mike Tolivers on Friday Oct. 31, 1980. We drank some beer and watch T.V. We talk about jumping and going deer hunting. A fly landed on the wall. Mike Toliver said shoot it. I said no. He kept saying go ahead. So I shot at it. I was starting to hurt bad so I took a pain pill. Because the day before I went to the doctor and had a vasectomy. We left and went the store to buy more beer. When we got back I saw it was getting late. So I left for home. It was around 11:30 or 15 til 12. As I was driving down the road. A vehicle was in my lane. I went down down in the ditch. Then I heard a loud hit. I turned around. And turned down a road. There was a bunch of them in the truck so I figured I would shoot out the tire. I have a telephone in my truck. So when they stop I was going to call the police. They didn't stop. So I went on home. Before I went home I did attempt to shoot out the tire of the truck.

DAVID ANTHONY NELSON,
Appellant
v.
THE STATE OF TEXAS,
Appellee

No. 0406-84

In the Court of Criminal Appeals
Austin, Texas

October 10, 1984

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

DAVID ANTHONY NELSON,
Appellant
v.
THE STATE OF TEXAS,
Appellee

No. 0406-84

In the Court of Criminal Appeals
Austin, Texas

November 21, 1984

On this day, the Appellant's Motion for Rehearing has been DENIED.

DAVID ANTHONY NELSON,
Appellant
v.
THE STATE OF TEXAS,
Appellee

No. 0406-84

In the Court of Appeals
Twelfth Supreme Judicial District
Tyler, Texas

December 20, 1984

The motion of David Nelson to stay the issuance of mandate in the above cause having been duly considered, it is ORDERED that said motion be, and the same is hereby GRANTED, and the Clerk of this Court is directed to stay the issuance of said Mandate until thirty (30) days from the date hereof, being January 21, 1985.

INDEX TO SUPPLEMENTAL APPENDIX

Judgment
Trial Court.....A-26

Sentence
Trial Court.....A-30

Opinion Affirming Judgment and
Sentence; Court of Appeals.....A-33

Opinion Refusing Petition for
Discretionary Review; Court of
Criminal Appeals.....A-50

Opinion Denying Motion for Rehearing
Court of Criminal Appeals.....A-51

Opinion Granting Stay of Mandate
Court of Appeals.....A-52